Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

CLARENCE CONYERS, JR.,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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185 pp

CAPITAL CASE

QUESTION PRESENTED

Charles Johnson testified as a State witness at Clarence Conyers's trial and capital sentencing proceedings to statements made by Conyers providing details of the murder of Wanda Johnson, for which Conyers received the death penalty. Prior to trial, the State provided open file discovery to defense counsel, which included the existence of a plea agreement with Charles Johnson in connection with robbery and related charges pending against him. Not only was the fact of a plea agreement disclosed to defense counsel, but the terms of that agreement and Johnson's written statement to the police were also provided to defense counsel. Johnson was questioned and cross-examined at Conyers's trial and sentencing on his motives for speaking with the police and testifying at trial, to include the fact that what began as a 19-count indictment against him ultimately ended in a plea agreement to conspiracy to rob and a one-year sentence. The state appellate court held, nonetheless, that failure on the part of the State to disclose documentation concerning the negotiations between either the police or prosecutor and Johnson leading to the plea agreement violated *Brady v. Maryland*, 373 U.S. 83 (1963).

The question presented is:

If the State informs defense counsel of the existence of a plea agreement with a government witness, the terms of that agreement, and the witness's written statement, does *Brady* require that the State provide details of any negotiations leading up to the plea agreement?

PARTIES TO THE PROCEEDING

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Conyers v. State*, 367 Md. 571, 790 A.2d 15 (2002), reversing the judgment of the Circuit Court for Wicomico County, is reproduced in Appendix A. (App. 1a-64a).

The unreported opinion of the Circuit Court for Wicomico County, Maryland, in *In Re: Clarence Conyers, Jr.*, Case No. 96CR0458, 96CR0460, denying Conyers's petition for post conviction relief, is reproduced in Appendix B. (App. 65a-144a).

Conyers first received a death sentence in 1996, which the Court of Appeals of Maryland vacated based on trial court error in admitting a pre-sentence investigation referring to non-adjudicated juvenile charges. *Conyers v. State*, 345 Md. 525, 693 A.2d 781 (1997). A second death sentence imposed in 1998 was affirmed on appeal. *Conyers v. State*, 354 Md. 132, 729 A.2d 910, *cert denied*, 528 U.S. 910 (1999).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland granting Conyers post conviction relief in the form of a new trial was filed on February 5, 2002. This petition is filed within 90 days of issuance of the opinion of the Court of Appeals of Maryland, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §

1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Facts Related to Convictions and Sentence

The facts underlying Conyers's convictions for the murders of Wanda Johnson and Lawrence Bradshaw were set out in detail by the Court of Appeals of Maryland as follows:

> At approximately 9:35 p.m., on Friday, October 21, 1994, Petitioner's estranged girlfriend, Monica Wilson, went to visit her mother, Wanda Johnson, at the home Ms. Johnson shared with her husband, Elwood Johnson. Ms. Wilson had just spoken with her mother at 9:00 p.m. that evening, and her mother had agreed to babysit for Ms. Wilson's son. Arriving with Ms. Wilson at the Johnson home was her cousin, Carla Clinton.
>
> As the two women approached the Johnson home,

they saw someone looking outside through a second floor bedroom window. The women knocked on the door, and, as they waited for someone to open it, they saw through a window a man walking down the stairs. The women saw this man turn off the lights inside the house and duck down as if to avoid being seen. The two women walked to a back door and knocked on it. The women heard sounds of a struggle, described as a "commotion," "tussling" and "fighting," coming from inside the house. Then Ms. Johnson began to scream, and a window on the second floor broke over the women's heads.

The two women fled to the home of a relative who lived nearby and called the police. On the way to the relative's house, Ms. Wilson noticed a car parked across the street from her mother's house. The car resembled one that Petitioner sometimes borrowed from his former girlfriend and mother of his child, Debra Meyers. Upon returning to the Johnson home, Ms. Wilson was informed by the police that her mother was dead.

There were no signs of forced entry into the Johnson home. Wanda Johnson's body was found in the master bedroom. She had been shot three times in the head, once in the back, and once in the arm. It was Ms. Johnson's custom to keep a small amount of money in her wallet. Furthermore, when Ms. Wilson spoke to Ms. Johnson earlier that evening, at approximately 9:00 p.m., Ms. Johnson said that she had twenty dollars. Ms. Johnson's open wallet was found atop her dresser in the master bedroom; there was no money in the wallet. In the den, a door to a closet had been forced open, revealing a safe. The

closet door had a hasp and a lock on it for security, but the hasp and lock had been pried out of the door jamb to gain access to the closet. Pulling the hasp out of the door jamb had caused splinters to fall on the floor around the closet. The safe inside the closet was closed. Mr. Johnson opened the safe the day after his wife's murder; it contained fifteen dollars.

The next day, Ms. Clinton worked with a police artist on a sketch of the man she had seen on the staircase inside the Johnson home the evening before. Ms. Wilson was asked to look at the sketch that had been made based on Ms. Clinton's description. Petitioner, who had come to the police station to keep Ms. Wilson company, took the sketch away before Ms. Wilson had a chance to see it, telling the police that the sketch would upset her. When Ms. Wilson finally had a chance to see the police sketch, she did not immediately identify Lawrence Bradshaw as the man depicted in the sketch. She made a photo identification of another man, who was arrested and incarcerated for a brief time as a result. Ms. Wilson later agreed, however, that the police sketch looked like Lawrence Bradshaw.

Shortly after 1:00 a.m. on October 23, 1994, approximately 27 hours after the murder of Ms. Johnson, Lawrence Bradshaw was shot in the 4300 block of McDowell Lane. This street is located in the Lansdowne area, near Debra Meyers's home. Mr. Bradshaw had been shot three times in the head, once in the back, once in the arm, and once in the finger. Mr. Bradshaw was taken to Shock Trauma, where he died the following day. *Conyers I*, 345 Md. at 534-36, 693 A.2d at 785-86.

* * *

At the second capital sentencing hearing, during the State's case, Charles Johnson (no relation to the victim, Wanda Johnson, or her husband) testified that while he was Petitioner's cellmate at the Baltimore County Detention Center in October-November of 1994, Petitioner discussed the robbery at Johnson's home. Charles Johnson stated Petitioner told him that he and a person named "Molek" went to Wanda Johnson's house and Petitioner went upstairs to rob a safe. Charles Johnson testified:

> "During the robbery, someone came to the door. At that point, Ms. Johnson yelled out . . . her daughter's name or something of that nature. And Clarence panicked, because, I guess, they would recognize him is what he said, and as a result, he wound up shooting Ms. Johnson."

Charles Johnson went on to state that Petitioner told him that while both he and "Molek" were upstairs at first, when they heard noise, "Molek" ran downstairs. After Johnson was shot, "Molek" ran but Petitioner waited until no one was outside before he left.

Wanda Johnson's husband, Elwood Johnson, testified that Petitioner was a frequent visitor to their home. He also described the layout of the home, providing specific details about a spare bedroom that contained a safe in a closet. The safe, which contained personal papers and petty cash, had a combination lock and the closet was secured with a lock and hasp. Mr. Johnson stated that earlier in the day, the safe and closet were in normal condition but when he returned after the shooting the closet had been forced open and the hasp was broken.

> Furthermore, his wife's wallet was lying open on a dresser in their bedroom, which normally would have been inside her purse and placed in a cabinet or dresser drawer.
>
> Wilson, the victim's daughter, basically recapped her trial testimony, describing her past relationship with Petitioner, her arrival at her mother's home with her cousin and son, hearing noise and her mother's screams, fleeing the scene and going for help down the street, and finally being informed of her mother's murder. Wilson also testified to Petitioner's efforts to prevent her from seeing the composite sketch of Bradshaw that her cousin helped develop and to keep her from reading or viewing any news related to the murder. Wilson stated Petitioner knew about the safe in her parents' spare bedroom and that he was aware her mother was not normally home on Friday evenings. Wilson knew that Petitioner owned a .38 caliber pistol, the type of weapon used to kill her mother.

(App. 83a-88a) (quoting *Conyers v. State*, 354 Md. at 143-47, 720 A.2d at 915-18).

B. Facts Related to the *Brady* Issue

The State complied with a defense request for *Brady* material and provided open file discovery to defense counsel, which included a January 1995 plea agreement between the State and Charles Johnson with respect to pending robbery and related charges. (App. 22a-23a). At a pre-trial suppression hearing relative to Conyers's statements to Johnson, Johnson testified that he contacted the police on Conyers's behalf and "didn't right out ask for

a deal" because he did not believe that the police could offer him a deal. (App. 23a-24a).

At the guilt/innocence trial, Johnson repeated that he went to the police on Conyers's behalf with the intent to help him, and defense counsel questioned such motivation. (E. 199-200). Defense counsel proceeded to cross-examine Johnson about several prior convictions and then addressed the indictment pending against him at the time he was Conyers's cell mate. (E. 190-95).[1] Defense counsel established that Johnson could have been facing a total of 244 years as maximum punishment, but that, as a result of an agreement with the State, could receive as little as one year. (E. 195-97). Defense counsel questioned Johnson about lies he allegedly told while in jail and the fact that Johnson "pumped" other people at the jail for information about their cases. (E. 201-03). Johnson denied reading any of the documents in Conyers's possession. (E. 203-04). He also denied claiming that Conyers would be his way out of jail. (E. 206). Defense counsel concluded cross-examination by pointing out that Johnson would receive a favorable sentence only if he implicated Conyers in the murders of Wanda Johnson and Lawrence Bradshaw. (E. 207-09).

At the re-sentencing proceeding, Charles Johnson essentially repeated his trial testimony. (E. 402-03). During cross-examination, Johnson acknowledged that he had a written agreement with the State to testify. (E. 407). Defense counsel reviewed charges which were pending

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[1] The references herein to E. are to the Record Extract that was filed in the Maryland Court of Appeals in *Conyers v. State*, 367 Md. 571, 790 A.2d 15 (2002).

against Johnson when he provided authorities information regarding Conyers. (E. 412-14). The charges were contained in a 19-count indictment, arising out of a robbery at a Wendy's, which, if Johnson were convicted on all counts, would result in a 244-year sentence. (E. 413-14). Counsel established that, after testifying in the Conyers case, Johnson pled guilty to one count of conspiracy to commit robbery and the remainder of the counts were dismissed. (E. 414-15). After testifying at Conyers's trial in 1996, Johnson was released with a sentence of time served. (E. 416). On redirect, Johnson clarified that, under his written agreement with the State, the State would recommend a one to six-year sentence on the conspiracy count, leaving Johnson free to ask for a lesser sentence. (E. 418).

Detective Marll, the lead detective in the homicide of Wanda Johnson, who took Johnson's written statement, was called by the State as a rebuttal witness. He testified that on November 23, 1994, he learned that Johnson had contacted the homicide office and asked to speak to someone about the murder investigation of Wanda Johnson. (E. 552). Marll and his partner went to the Detention Center and took Johnson back to the police department, where they obtained a statement from him. (E. 552-53). According to Marll, Johnson did not ask for any favors in return for the information he provided. (E. 553).

The Court of Appeals of Maryland on direct review of the death sentence agreed that the jury was provided a full picture of Johnson. The court observed as follows:

> During the sentencing hearing, and also during the defense's closing statements, the jury was made well aware of the Appellant's theory that Charles Johnson

> was a jailhouse "snitch" who fabricated his conversations with Appellant regarding the Wanda Johnson murder so that he could reduce his own time spent in prison. We can safely assume that the jury took this theory with them into the jury room for deliberations and considered it and any supporting evidence, along with all the other evidence in the case, before rendering its verdict.

Conyers, 354 Md. at 161, 729 A.2d at 925.

At the post conviction hearing, Detective Marll repeated his trial and re-sentencing testimony regarding the interview with Charles Johnson and Johnson's written statement. According to Marll, after Johnson completed his written statement, but before signing it, Johnson asked if there was anything that could be done for him regarding the charges pending against him. (E. 1121).

> And at the time, we said we don't make any deals, we can't make any promises. The only thing we can do is take the statement to the State's Attorney Office, and they can get in touch with your attorney and anything along that line can be done by them. We stay entirely out of it.
>
> At that time, I asked if he would sign the bottom of the statement form, and he said he didn't want to, he didn't feel comfortable signing it, but he said he would put his initials there, and he did, he wrote them on each page in front of us and placed his initials on each line next to the signature block area, and at that time, we were done. He was subsequently taken back over to the detention center.

(*Id.*). Detective Marll testified that no benefits of any kind were provided by the police department to Johnson. (E. 1145).

With respect to Conyers's claim that, contrary to Detective Marll's testimony, Johnson provided information to the police only in exchange for some benefit, the post conviction court stated as follows:

> Based on the evidence presented at the hearing, Charles Johnson willingly provided information to the police with no prearranged agreement or deal. He apparently elected not to sign the written statement he willingly provided in the hope that he could arrange an agreement with the State's Attorney for his testimony at trial. Charles Johnson was telling the truth when he said that "he didn't right out ask for a deal [of the police]." He correctly didn't feel the police could offer a deal. Detective Marll was telling the truth that Charles Johnson didn't ask "for any promises or favors in return for the information" he gave to the police. This is verified by the fact that he did give the information to the police with no agreement or deal.
>
> Charles Johnson did want an agreement in exchange for his "testimony." He knew and/or was told that the police could not accomplish that.
>
> The only evidence which could refute the initial motivation is his subsequent act of securing an agreement to testify for the State in exchange for a benefit for him. This information was provided by the State to all counsel for the Petitioner and was the primary subject of cross-examination.

(App. 139a)(emphasis in original).

A majority of the Court of Appeals of Maryland disagreed with the post conviction court, refusing to recognize a distinction between the initial information Johnson provided to the police without benefit and

Johnson's subsequent agreement to testify at trial in exchange for favorable treatment. (App. 37a-39a). As a result, the Maryland court reached two conclusions: one, that the State violated *Brady* by failing to disclose evidence concerning Johnson's initial request for a benefit after having provided information that was then reduced to writing; and, two, that the State violated *Brady* by failing to disclose Johnson's refusal to sign the written statement. According to the court, nothing was disclosed concerning Johnson's negotiations for a deal. (App. 45a-47a).

The State court majority then went on to find the information it believed to have been suppressed to be both favorable and material. (App. 47a-59a). It was favorable, according to the court, because it deprived the jury of the circumstances leading to consummation of a plea agreement which would provide further impeachment evidence. (App. 49a). It was material under *Brady/Bagley,* according to the court, because Johnson's statement was the most direct evidence of principalship, albeit not the only evidence, and there was a substantial possibility that the outcome would have been different had the withheld information been disclosed. (App. 56a-59a).[2]

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[2] A second *Brady* claim raised by Conyers was that the State failed to provide documentation regarding unsuccessful efforts at verification of details provided by Johnson in his written statement to the police. (App. 14a-15a). Such claim was based on post conviction counsel's belief that not all of the details in Johnson's statement were necessarily verified as true by the police, and that Detective Marll's testimony at re-sentencing stating that they had been was, thereby, false. While the Court of

The dissent maintained that the State fulfilled its *Brady* obligations by providing impeachment evidence that Johnson received benefits for his testimony by way of a favorable plea bargain. (App. 63a). The dissent noted that

> [i]t is almost . . . universally understood that plea

Appeals made pointed comments regarding this issue throughout its analysis of the first *Brady* issue, it did not ultimately rule on it, finding only a *Brady* violation as to the first claim. Although the issue is not before the Court, it should be pointed out that the State court's remarks ignore a crucial fact. At the initial sentencing proceeding, Detective Marll provided a laundry list of the information in Johnson's statements which Johnson could only have learned from Conyers. (E. 238-50). At re-sentencing, defense counsel sought the State's agreement to generalize Marll's opinion. Defense counsel recalled that, during a chambers conference, there was an agreement "to satisfy the interests that I had and to satisfy the interest that the State had in having some evidence to corroborate Charles Johnson's testimony, we agreed to this language." (E. 1031). Thus, Marll's response, when the prosecutor asked whether there was any information given to him by Johnson and verified by the police that was above and beyond what was contained in Conyers's papers, was, based on the defense request, that there was such information and, that the detective was able to verify each and every statement given to the police by Johnson. (E. 554). There was no effort to deceive the jury regarding verification of details of the murders provided by Johnson, but, rather, an accommodation to a defense request to generalize any comment relative to those details.

> bargaining constitutes favors. Additionally, the very use of the general term "bargain" implies a give and take procedure where things are withheld and other things offered; some are accepted, some are rejected. When the jury was informed of the plea agreement, it, impliedly, was informed that a give and take process for Johnson's testimony had been undertaken and been consummated.

(App. 63a). The dissent concluded that the purpose of *Brady* "is to insure that the jury is made aware of the motive for fabrication on the part of the witness, not to mandate that every nuance of the process from which the motive to fabricate originates be remembered and/or disclosed." (App. 64a).

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision of the Court of Appeals of Maryland is warranted for three reasons. First, while clearly holding that a prosecutor has an affirmative duty to disclose the existence of a plea agreement with, or like favorable treatment of, a State witness, this Court in *Brady* and its progeny has never addressed the scope of such disclosure in the context of determining whether the prosecutor suppressed evidence. Beyond stating that the prosecution has a duty to learn of any favorable evidence known to others acting on behalf of the prosecution, and to disclose such to a defendant, but that the obligation under *Brady* is not the same as discovery, this Court has never articulated precisely what a prosecutor must disclose pursuant to *Brady* regarding preliminary negotiations or bargaining with a potential witness by either the police or the prosecutor, and, to the extent it has done so in other

contexts, the state court majority ignored such limitations. Second, the state court's majority opinion conflicts with rulings of other state and federal jurisdictions considering similar *Brady* claims. Third, there are unfortunate public policy ramifications to the Maryland court's expansive reading of a prosecutor's *Brady* obligations. With this case, the Court can articulate whether a prosecutor's duty to disclose under *Brady* extends not only to the existence and terms of a plea agreement with a witness, but to the negotiations leading up to that agreement.

I. This Court Has Not Defined the Scope of *Brady* in the Context of Plea Agreements, and, to the Extent That It Has Limited the Scope in Other Contexts, the State Court Misapplied Such Precedent.

In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. When the reliability of a witness is determinative of guilt or innocence, nondisclosure of impeachment evidence falls within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150, 154 (1972). *Accord United States v. Bagley*, 473 U.S. 667, 676 (1985) (no distinction between exculpatory evidence and impeachment evidence). *Cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

To establish a *Brady* violation, a defendant must establish one, that the prosecutor suppressed or withheld evidence, two, that the evidence is favorable to the defense, and, three, that the suppressed evidence is material. *Bagley*, 473 U.S. at 674-78. As to the first prong of the *Brady* standard, suppression by the prosecution, this Court has stated that *Brady* principles were not intended "to displace the adversary system as the primary means by which truth is uncovered." *Id.* at 675.

Thus, the prosecution is not required to make a complete accounting to the defense of all background work on a case. *Moore v. Illinois*, 408 U.S. 786, 795 (1972). As Justice Fortas stated in his concurring opinion in *Giles v. Maryland*, 386 U.S. 66 (1967), it is only when the State "has in its exclusive possession *specific, concrete evidence which is not merely cumulative or embellishing* and which may exonerate the defendant or be of material importance to the defense--regardless of whether it relates to testimony which the State has caused to be given at trial--the State is obliged to bring it to the attention of the court and the defense." *Id.* at 100 (emphasis added).

Following this Court's decision in *Brady*, the Court in *Giglio* applied the same fairness principles to impeachment evidence. In *Giglio*, the government failed to disclose to the defendant a promise to a witness that the witness would not be prosecuted if he testified for the government. 405 U.S. at 150-51. The witness's testimony that there was no bargain went uncorrected. *Id.* at 151-52. The Court held that non-disclosure of the government promise, even though the prosecutor making the promise was not the same prosecutor trying the case, deprived Giglio of a fair trial. *Id.* at 154. However, according to the Court, "[w]e do not . . . automatically require a new

trial whenever 'a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" *Id.*

In *United States v. Agurs*, 427 U.S. 97 (1976), the Court defined suppressed information as "information which had been known to the prosecution but unknown to the defense." *Id.* at 103. The Court pointed out that, in considering the *Brady* claim before it, it was not addressing the scope of discovery, but only a defendant's right to a fair trial. *Id.* at 107.

> The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady*. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

Id. at 108-09 (footnote omitted). *Accord Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate."); *Bagley*, 473 U.S. at 675 n.7 (prosecutor not required to deliver his entire file to defense counsel since "a rule that the prosecutor commits

error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments").

In *Kyles*, which dealt with exculpatory rather than impeachment evidence, the Court acknowledged that the mere fact that a prosecutor knows of favorable evidence unknown to the defense is not, without more, a *Brady* violation. 514 U.S. at 437. However, the Court stated that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437-38. The Court recognized "that police investigators sometimes fail to inform a prosecutor of all they know," but reiterated that procedures can be put in place "to ensure communication of all relevant information." *Id.* at 438 (quoting *Giglio*, 405 U.S. at 154). Further, once learning of arguably favorable material, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 439 (quoting *Agurs*, 427 U.S. at 108). Finally, the Court pointed out that a prosecutor errs only when the non-disclosed information is material. *Id.* at 439.

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. *Accord Kyles*, 514 U.S. at 433-34. Any omission must be evaluated in the context of the entire record and must be significant enough to result in the denial of a fair trial. *Agurs*, 427 U.S. at 112.

The materiality standard relative to impeachment evidence was analyzed most recently in *Strickler v. Greene*, 527 U.S. 263 (1999). The Court noted that it was

not sufficient that any allegedly withheld evidence merely discredit a witness or even that the impeachment could have changed the outcome of the trial. *Id.* at 289. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 290 (quoting *Kyles*, 514 U.S. at 435).

This Court has not considered in the above-cited cases a situation as that presented here, where the prosecution disclosed the fact of a plea agreement with a witness, the terms of the agreement, and the information provided by the witness, and yet is called to task pursuant to *Brady* for not disclosing details of the witness's discussions with the police or subsequent negotiations between the prosecutor and the witness. Surely *Brady*, which simply assures a defendant a fair trial, does not reach so far.

Maryland's highest court erroneously stretched the *Brady/Giglio/Kyles* holdings to apply to a situation where the existence and terms of a plea agreement with a government witness are fully disclosed to a defendant, but the witness's conversation with a police detective and the steps in the negotiations with a prosecutor leading to the plea agreement are not. Contrary to the Maryland court's conclusion, on this record, the prosecution could not disclose evidence which did not exist: there was no request, offer, or promise of favorable treatment prior to the police interview and completion of a seven-page statement.

Having provided the authorities with what he knew to be useful information, Johnson began negotiations for a possible benefit when it came time to sign his statement. He agreed to initial the statement, however, and defense counsel was provided a copy of the initialed statement.

Subsequent negotiations between Johnson and the prosecutor led to a plea agreement with Johnson, the existence and terms of which were fully disclosed to the defense. It was the agreement that constituted favorable treatment, not the negotiations leading to it. Those details were mere embellishment. Further, while a prosecutor has a duty to learn of relevant material potentially disclosable under *Brady*, and appropriate information in police files may constitute such material, it is difficult to see how a police officer's comment to a potential witness meets this definition.

Finally, under the *Agurs* definition of what constitutes suppressed information, i.e., information known to the prosecution, but unknown to the defense, the fact that Detective Marll met with Johnson and the fact that Johnson initialed his statement, rather than signing it, were known to defense counsel. As such, nothing was suppressed. Counsel had the opportunity to question Detective Marll about the meeting and statement, but focused instead on the more critical fact, i.e., that Johnson successfully negotiated a favorable plea agreement in exchange for his testimony against Conyers.

In this case, the prosecution did not fail to disclose evidence of favorable treatment pursuant to *Brady*. The Court of Appeals decision to the contrary is a misapplication of *Brady* principles. It stretches the *Brady* standard far beyond what this Court intended. This case presents the Court with an opportunity to elaborate on the scope of one component in a *Brady* analysis, i.e., whether the prosecution has suppressed *Brady* evidence when it discloses the existence and terms of a plea agreement, but does not disclose details of the negotiations culminating in that agreement.

II. The Decision Below Conflicts With Rulings of Other State and Federal Jurisdictions Considering Similar *Brady* Claims.

The constitutional concern in the *Brady/Giglio* context is what might induce a witness to testify falsely. The motivation to do so arises from a favorable agreement itself, not from the negotiations preceding the agreement. Most recently in *Rubalcada v. State*, 731 N.E.2d 1015 (Ind. 2000), the Indiana Supreme Court considered a situation where the prosecution disclosed before trial the terms of a plea agreement offered to, but not accepted by, a witness who then testified at trial and was cross-examined about the offer and its rejection. *Id.* at 1023-24. Four months after trial, the witness did enter a plea agreement with slightly more favorable treatment than that originally offered. *Id.* at 1024. The defendant's *Brady* complaint was that all of the possible terms of an offer were not disclosed and the jury was unable to weigh the full extent of the witness's motivation. *Id.* at 1023.

The Indiana Supreme Court reaffirmed its recognition of the prosecutor's duty to disclose any agreement with a witness or any promise, grant of immunity, or reward offered in exchange for testimony. *Id.* at 1024. However, the court repeated the following caveats: "The prosecutor's duty of disclosure arises when there is a confirmed promise of leniency in exchange for testimony, but *preliminary discussions are not subject to mandatory disclosure*." *Id.* (emphasis added). Further, hopes for leniency when the State neither confirms nor denies such hopes are not concrete agreements requiring disclosure. *Id.*

Likewise, in *Wright v. State*, 690 N.E.2d 1098 (Ind.

1998), the court recognized the importance of fully disclosing express plea agreements or understandings between the state and witnesses, written or unwritten, but limited this duty to a confirmed promise of leniency in exchange for testimony, not to preliminary discussions. *Id.* at 1113. In *Wright*, the state did not disclose any agreement with a witness and the witness testified that there was no plea agreement in exchange for his testimony, although shortly after that testimony the witness was accorded favorable treatment by way of a plea to a reduced charge. *Id.*

According to the court, an express agreement does not exist if a witness has some hope of leniency which is neither confirmed nor denied, or when that hope and expectation is consummated after the testimony. *Id.* The court held that the witness's hopes, combined with the state's serious consideration of reducing the charges based on the witness's assistance, did not establish an agreement requiring disclosure. *Id.* at 1114. *Accord Sigler v. State*, 700 N.E. 2d 809, 812 (Ind. App. 1998) ("An express agreement exists where there is a confirmed promise of lenience in exchange for that witness's testimony. On the other hand, preliminary discussions need not be disclosed nor is disclosure required where in fact the witness hopes for leniency but the State neither confirms nor denies that hope to the witness."); *Lopez v. State*, 527 N.E.2d 1119, 1129 (Ind. 1988) (preliminary discussions are not subject to disclosure); *Bubb v. State*, 434 N.E.2d 120, 122 (Ind. App. 1982) (prosecutor need not disclose preliminary discussions concerning witness immunity). *See also Carter v. Bell*, 218 F.3d 581, 601-02 (6th Cir. 2000) (where defense knew of plea agreement in exchange for testimony wherein witness would plead to lesser included

offense and receive reduced sentence, and such fact was brought out on cross-examination, prosecution not required to disclose additional evidence of any agreement as to where witness would serve his sentence).

Under the analysis applied by the Indiana courts, there is no *Brady* obligation to provide information relevant to preliminary discussions with a witness not resulting in a pre-testimony plea agreement. Applying that analysis to the instant case, there certainly can be no constitutional requirement to disclose details of preliminary discussions with the police or prosecution resulting in a plea agreement, the existence and details of which are fully disclosed to the defense before trial.

On the federal side, the Eleventh Circuit has attempted to define the scope of the *Giglio* obligation. In *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985)(en banc), *aff'd in part*, 481 U.S. 279 (1987)(not addressing *Giglio* claim), the court considered circumstances somewhat similar to those in the instant case. Offie Gene Evans was a jail cellmate of McCleskey's who testified as a rebuttal witness at trial that McCleskey confessed to being the person who fired a gun that killed a police officer. *Id.* at 883. Evans testified that he was charged with escape and being detained by federal authorities, but denied receiving any favors from the prosecution in exchange for his testimony. *Id.* He also downplayed the seriousness of the federal charge. *Id.*

At a post conviction proceeding Evans again denied being promised anything in exchange for his testimony, although he stated that he was told by one detective that the detective would put in a good word for him. *Id.* It was further established that, after McCleskey's trial, the prosecutor contacted federal authorities to advise them of

Evans's cooperation, and that federal escape charges were subsequently dropped. *Id.* The state court held that the detective's communication with Evans was insufficient to trigger the applicability of *Giglio*. *Id.*

The Eleventh Circuit agreed, noting that this Court "has never provided definitive guidance on when the Government's dealings with a prospective witness so affect the witness's credibility that they must be disclosed at trial." *Id.* at 884. After referring to the holdings in *Giglio* and *Napue*, the court held that "the detective's promise to speak a word falls far short of the understandings reached in *Giglio* and *Napue*." *Id.* According to the court, it was doubtful that the detective's statement would motivate a reluctant witness. *Id.* Therefore, there was no infringement of McCleskey's due process rights. The court further concluded that, although Evans's testimony added weight to the prosecution's case and was important in several key respects, revelation of the detective's statement would not have affected the jury's assessment of the witness's credibility. *Id.* at 885. *Accord Alderman v. Zant*, 22 F.3d 1541, 1554-55 (11th Cir.) (*Giglio* does not address or require disclosure of all factors which may motivate a witness to cooperate), *cert. denied*, 513 U.S. 1061 (1994).

However, the Eleventh Circuit, to some extent, has also limited its holding in *McCleskey*. *See Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985) (distinguishing *McCleskey* and finding that "[e]ven mere "advice" by a prosecutor concerning the future prosecution of a key government witness may fall into the category of discoverable evidence since it would constitute an informal understanding which could directly affect the witness's credibility before the jury."); *see also Patillo v.*

State, 368 S.E.2d 493, 497-98 (Ga.) (distinguishing *McCleskey* and finding that prosecutor's agreement to inform judge of cooperation of witness was more than offer of police detective to "speak a word," but further concluding that the information was not material and, therefore, not disclosable), *cert. denied*, 488 U.S. 948 (1988).

To the extent there is authority for the proposition that pre-trial, informal promises or suggestions of leniency constitute *Brady* material, the instant case is not such a situation where, with no definitive agreement disclosed pre-trial, a witness was accorded favorable treatment post-trial, suggesting the existence of a tentative pre-trial agreement. Here, the existence of the agreement and its terms were disclosed pre-trial, and thus satisfied *Brady*.

As was the case in *McCleskey*, the initial conversation between Detective Marll and Johnson relating to any favors for Johnson's testimony and Johnson's initialing, rather than signing, his statement likewise fall short of the *Giglio/Napue* type of understanding subject to disclosure. Further, these embellishing details of the plea agreement would not have affected the jury's assessment of Johnson's credibility such that the result of Conyers's trial was unfair, and, therefore, such details were not material.

III. There Are Unfortunate Public Policy Ramifications to the Maryland Court's Expansive Reading of a Prosecutor's *Brady* Obligations.

This Court has made clear that a prosecutor is not required to deliver to the defense everything that might conceivably be of help to a defendant. *See, e.g., Kyles*, 514 U.S. at 437. The reason for the limitation is that such

an obligation "would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." *Bagley*, 473 U.S. at 675 n.7. A recent case in the Fourth Circuit is instructive in demonstrating the ramifications in broadly interpreting the scope of *Brady* in the context of a prosecutor's obligations.

In *Spicer v. Roxbury Correctional Institute*, 194 F.3d 547 (4th Cir. 1999), Larry Brown, a state witness at Spicer's trial, originally told his attorney that he saw Spicer in the days before and after an assault for which Spicer was charged, although, according to his attorney, Brown did not indicate that he saw Spicer immediately after the assault. *Id.* at 551. The prosecution negotiated a plea with Brown who agreed to testify against Spicer. *Id.* In the prosecutor's subsequent conversations with Brown, Brown stated that he had seen Spicer running from the scene of the assault, and he so testified before the grand jury and at trial. *Id.* at 551-52. Spicer claimed, without success, on state collateral review that the prosecutor's failure to disclose an inconsistency in Brown's statements violated *Brady*. *Id.* at 553-54.

On federal habeas review, the Fourth Circuit panel majority agreed with the district court that Brown's prior inconsistent statement to his attorney that he did not see Spicer on the day of the assault, which was contrary to his testimony at trial that he did see Spicer that day, was impeachment evidence subject to disclosure under *Brady*. *Id.* at 557. According to the panel majority, the prosecutor recognized the distinction between what was told to him by Brown's attorney and what Brown himself said, but "was indifferent to it because he was skeptical of the reliability of Brown's attorney's version." *Id.* at 558. Although agreeing that such a decision was "logical and

proper in carrying out the adversarial part of the prosecutor's responsibilities," the panel majority believed that under *Brady*, it should, nonetheless, have been disclosed. *Id.* at 558. In so concluding, the panel majority attempted to limit the scope of its holding, emphasizing that it was not holding "that the prosecutor is obligated to disclose potentially exculpatory material contained in the back-and-forth hypothesizing that commonly occurs during plea negotiations between the prosecution and defense attorneys." *Id.*

One panel member filed a strong dissent to the majority's conclusion, referring to the majority's holding as "an unprecedented expansion of *Brady* and the unwarranted issuance of the Great Writ." *Id.* at 563. The dissent pointed out that it was not Brown's statements that were inconsistent, but Brown's attorney's proffer as to what Brown could offer and Brown's subsequent grand jury and trial testimony. *Id.* at 565. Brown's statements to the prosecutor, to the grand jury, and at trial were consistent. *Id.* at 564. According to the dissent, "[p]roffers by counsel attempting to negotiate a plea, immunity, or other benefit for their clients are, by their very nature, unreliable for ascertaining specific facts." *Id.* at 565. The dissent characterized the plea process as resembling "a poker game, rife with understatement, bluff, and bluster." *Id.* at 566. According to the dissent, plea negotiations often result from informal, impromptu contacts. *Id.* To impose a duty on a prosecutor to scrutinize such contact in order to meet the majority's view of *Brady* made no sense to the dissent. *Id.* at 567. Further, Spicer's attorney knew before trial that Brown's credibility was suspect and had access to Brown's attorney. *Id.* at 568. On these facts, the dissent could find

no *Brady* violation, and warned of the negative impact on plea negotiations if it were otherwise. *Id.* at 568-70.

A prosecutor's duty is to be on the alert for and to disclose exculpatory evidence, but *Brady* does not, and should not, require a prosecutor to ascertain the details of verbal sparring between the police and a potential witness or to scrutinize the prosecutor's own negotiations with a witness. Further, there can be no *Brady* violation if defense counsel knows or reasonably should know of potentially exculpatory or impeaching information and fails to exercise reasonable diligence to exploit it.

In the instant case, Johnson negotiated a plea for himself, the terms of which were fully disclosed to the defense. It was not the prosecutor's responsibility once he negotiated a plea and disclosed that information to Conyers's attorney to search out from either Johnson or the police some detail of the negotiations that might be perceived as favorable to Conyers. Such information, if it existed, was equally available to Conyers through reasonable diligence. Public policy dictates that a prosecutor's responsibilities should not be read as broadly or far-reaching as mandated by the Maryland court.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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